

NOTES ON BUYING A COMMERCIAL PROPERTY

For the use of the clients of Baldock Stacy & Niven



1. PREPARING FOR BUYING

For commercial properties there is no requirement that a contract be prepared by the Vendor (Seller) prior to advertising the property. Sometimes a contract is available and sometimes it is not. After you have agreed to purchase a commercial property the Vendor's solicitors will prepare a contract. This may take 7 to 10 days.

Not every contract is simple and there may be terms in it that are unfair to you. There are some laws protecting you from unfair terms in contracts. The laws do not however, protect you from every type of unfair clause. The best advice is to take care by getting legal advice before signing.

Gazumping is a practice in which the seller sells to someone else at a higher price after a verbal bargain has been made with you as the buyer, but before there is a binding written contract.

2. ENTERING INTO A CONTRACT

The contract prepared by the seller's solicitor is usually in the form held under joint copyright by The Real Estate Institute of New South Wales and The Law Society of New South Wales. For convenience, it is referred to here as "the contract". Normally, contracts are made binding by the seller signing the original and you signing an exact copy of it, and those contracts being exchanged and dated and the deposit being paid. Each party then holds a contract signed by the other party.

3. SMALL PRINT IN THE CONTRACT OF SALE

The form of contract is a multi-purpose one. It can be used with only small changes for the sale of vacant land anywhere in the state worth only a small amount as well as for the sale of a very expensive house or factory. Many of the clauses are there to protect both you and the seller if something unexpected occurs. Very often, they operate to prevent trouble. The basic printed clauses are accepted as keeping a reasonable balance between the interests of both seller and buyer.

4. VENDOR DISCLOSURE

Vendor Disclosure Regulations require the seller of any land (whether residential property or not) to disclose certain matters in the contract and to make certain warranties (or promises). The Regulations were introduced in an attempt to simplify conveyancing and reduce delay in the time it takes to make a contract binding. They require a seller to attach the following documents to the contract and, if they are not attached, you may cancel the contract within 14 days of the date of making the contract.

The usual documents to be attached include:

- (a) a zoning certificate under s149(2) of the Environmental Planning and Assessment Act, 1979;
- (b) a drainage diagram showing where the sewer lines are in relation to the land;
- (c) a copy of the Title Deed where the land is under the Real Property Act;
- (d) an official plan of the land ;
- (e) a copy of all documents creating easements over the land (right of way etc.) and covenants; and
- (f) if it is a sale of a Strata Title property, a copy of the Strata plan showing all the lots, a copy of the Title Deed for the strata lot being sold, and a copy of the Title Deed for the common property.

5. THE DEPOSIT

This is usually 10% of the purchase price. It is usually paid to the agent to hold as depositholder until completion. The deposit can be more or less than 10% of the purchase price if the parties agree. Sometimes it is reduced by agreement if the purchase is going to take a long time. If there is no agent, the deposit is paid to the seller's solicitor. The parties can agree to the deposit being invested until settlement. Usually, the interest is shared equally between the seller and you.

The agent does not account to the seller or the seller's solicitor for the deposit until after settlement when we authorise in writing. Usually the agent deducts the selling commission and pays the balance of the deposit as directed by the seller's solicitor.

6. PEST CERTIFICATE AND BUILDING INSPECTION

These should be obtained before contracts are made binding. In most cases, you take the buildings in their present state and condition and with any pest infestation existing when contracts are made unless there is a clause making the contract subject to the obtaining of a satisfactory building report and pest certificate. It is better to obtain the reports before exchange. It is in your interest to obtain these reports and we can arrange this.



7. FINANCE

You may need time after deciding on the property to get approval for a loan to buy it. Most sellers understand this.

8. EXCHANGE OF CONTRACTS

There are two major steps in a purchase. The first is making a binding contract (called "exchange"). The second is settlement of the sale. In between exchange and settlement we make title searches and enquiries about the property and arrange for payment of stamp duty and for signing of mortgages in readiness for settlement. Settlement occurs when you pay the seller the balance due under the contract and receive title to the property.

9. INSURANCE AND PASSING OF RISK

Unless otherwise stated in the contract, you buy the property in the state and condition it is in at the date of the contract. As lawyers say, "You buy it as you find it." Between the date of contract and the date of settlement, it is the duty of the seller to use reasonable care to keep the property in a reasonable state of preservation, given its condition when the contract was made. A clause in the printed contract provides that the seller is not liable for any fair wear and tear of the property during this period.

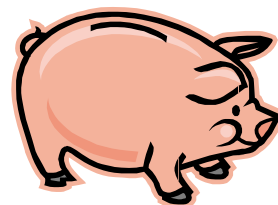
The risk of damage to buildings and other fixtures remains with the seller until settlement or when you take possession. Possession includes occupation until settlement, or receipt of income from the property. When buildings and other fixtures are substantially damaged after the making of a contract for the sale of land, and before the risk of damage passes to you, you may rescind the contract by notice in writing within 28 days and in that case all money paid by you under the contract must be repaid to you.

10. FIXTURES

All fixtures are included in the sale without having to be mentioned specifically. In law a fixture is something attached to the land or building that cannot be either simply lifted up and taken away, or unscrewed and taken away without doing any damage. Most electric stoves are wired in so they are fixtures, but most refrigerators are plugged in, so they are not fixtures. The safest course is to refer in the contract specifically to items about which there can be any room for doubt.

11. STAMP DUTY

Stamp duty is payable on the price being paid for the property. We send the contract and transfer to the Office of State Revenue for stamping. Mortgages are also liable to stamp duty. The Office of Land and Property Information will not register a transfer or mortgage unless it is stamped. Most lenders require us to hand over on settlement a stamped transfer, so the transfer and mortgage can be lodged for registration immediately after settlement.



The rates of stamp duty on conveyances of property are shown below:

<u>VALUE OF PROPERTY</u>	<u>RATES OF DUTY PER \$100 OR PART OF \$100</u>
Not exceeding \$14,000	\$1.25 with minimum of \$10
\$14,001 - \$30,000	\$175 plus \$1.50 per \$100 in excess of \$14,000
\$30,000 - \$80,000	\$415 plus \$1.75 per \$100 in excess of \$30,000
\$80,000 - \$300,000	\$1,290 plus \$3.50 per \$100 in excess of \$80,000
\$300,000 - \$1,000,000	\$8,990 plus \$4.50 per \$100 in excess of \$300,000
over \$1,000,000	\$40,490 plus \$5.50 per \$100 in excess of \$1 million.

The rates of stamp duty on mortgages are:

<u>LOAN AMOUNT</u>	<u>RATE OF STAMP DUTY</u>
Up to \$16,000	\$5
Over \$16,000	\$5 plus \$4.00 for every \$1,000 (or part of \$1,000) over \$16,000

Stamp duty must be paid within three months of the date of signing the contract or mortgage. There is interest payable to the state government for late payment. If the document is stamped after three months interest is payable until payment is made.

12. LAND TITLES

(a) Torrens Titles

Land under the Real Property Act is known as Torrens title land. It is the least expensive title to investigate and transfer. It is by far the most common land title. Under the Torrens system there is one Certificate of Title. Once you are registered on the Title you are the State guaranteed owner and have "an indefeasible title" except for "fraud and error". The Torrens Title system depends upon a register in which dealings with property interests are recorded by computer. Nearly every parcel of land (there are some three million separate parcels of land in New South Wales) has its own computer generated folio of the Register.

(b) Old System Title

There is a small amount of land in NSW still held under Old System Title. The expense of investigating an Old System title is greater than Torrens Title as we need to investigate the chain of title for at least the past 30 years.

(c) Qualified Title

Qualified Title results from Old System Title while it is in the process of being changed to Torrens Title and the issue of a computer folio certificate for the land. We have to investigate the Old System title fully even though a Qualified title has issued.

(d) Limited Title

Limited titles are titles for which the boundaries of the land have not been established by survey. The limitation does not restrict dealing with the land.

(e) Other Titles

Strata titles and Community titles are both part of the Torrens title system.

The Office of Land and Property Information has issued computer folio certificates for virtually all Crown Land titles so they are now in the same form as Torrens Title deeds and are transferred using the same forms as apply to Real Property Act land.

13. STRATA TITLE

When you buy a Strata Title property, you get a title deed for airspace in a building. To buy a Strata Title property is to buy into a small democratically governed community of owners. This entails both rights and duties. This entails rights to manage the properties by voting for members of the Council of the "owners' corporation". Duties include paying the contributions levied by the Council of the owners' corporation.

In buying a Strata Title property, there are many factors to consider. Many of these are not related to the title to the property (such as the condition of the shared areas known as "common property" and whether there is any roofing or plumbing problems, and so on). We only investigate matters related to the title, but we can of course investigate other matters not related to the title if instructed to do so. There are firms, which specialise in making inspections and providing reports for intending buyers of Strata Title properties.



An inspection report may include the following information:

- Strata Roll - details of the owner and any mortgagee or tenant;
- records of Notices or Orders served on the owners' corporation;
- books of account - whether they are kept properly, and details from the last balance sheets of the Administrative Fund (for recurrent running expenses) and the Sinking Fund (provided for long term maintenance of the building);
- the amount of the current levies for the Administrative and Sinking funds and any special levies made for either fund or any information about proposals for special levies or increase in levies;
- details of all the insurance cover;
- by-laws - The by-laws including any special ones, for instance about the keeping of animals;
- minutes of meetings of the Council of the owners' corporation must be retained for six years.

17. SURVEY

It is wise to obtain an Identification Survey Report when buying a property. It shows where the building is in relation to the boundaries of the land, and whether there are any structures that encroach onto the land. It is different from a survey of land for a subdivision, which shows only the boundaries and area. Some lenders



lenders require an Identification Survey Report. Sometimes the seller already has one and supplies it to you. Usually we obtain the Identification Survey Report if you or your lender requires one.

18. COVENANTS

Sometimes there are covenants on the title. These are requirements placed on the title usually by the original subdivider in the nature of private town planning restrictions. A typical requirement is that there should be only one dwelling per lot and it should be brick with a tiled roof.

The aim is mostly to keep buildings within the subdivision at a uniformly high standard. Covenants "run with the land". That is, they may be restrictive covenants stating what improvements cannot be made on the land or prescriptive covenants imposed by a prescribed authority (the Crown, a public or local authority or a prescribed corporation) providing what improvements must be made and maintained. The seller in the contract must disclose details of all covenants.

19. RESERVATIONS IN THE CROWN GRANT

From the early days of the colony, the crown made grants of land to European Settlers. All Crown Grants provide for reservation to the Crown of some minerals. The list of minerals became longer as more were discovered. Reservation of a particular mineral means only that the Crown is entitled to royalties from the sale of any of that mineral mined on the land.

20. THE MORTGAGE

We supply particulars of title to the lender (bank, building society, credit union etc) or its solicitor as appropriate, so the mortgage can be prepared and submitted for signing. Usually the lender requires the same survey, searches and inquiries that we obtain.

It is often cheaper to borrow from a bank because some banks prepare their own mortgages. Some other lenders use solicitors and those solicitors' costs must be paid before the loan is made available. Banks require a solicitor's certificate as to title where it is an Old System title, a Qualified Title or a Crown land title. We investigate the title and supply the bank with a certificate on a form provided by the bank.

21. FENCING

You can claim a half contribution from the neighbour for the erection or repair of a dividing fence provided:

- (a) you follow the procedure set out in the Dividing Fences Act 1991. That Act simply requires an owner to serve a notice in writing on a neighbour specifying the boundary to be fenced, the kind of fence proposed, and making a firm proposal about who should do the fencing and at what cost. If no agreement is reached within a month after service of that notice the owner can apply to the Local Court or the local land board for an order. You cannot just build a fence and sue afterwards for half the cost; and
- (b) the person selling the property to you is not your next-door neighbour. A clause in the contract provides, in effect, that the seller is not bound to contribute towards the cost of erecting a dividing fence between the two properties. If you want one, you must pay for it.

22. COUNCIL RATES

The usual provision in the contract is that rates should be adjusted at the date of possession or any other date the parties agree. We will calculate the proportion of rates payable by the seller for the days up to settlement and the amount payable by you for the number of days from settlement until the end of the rating period. Interest is payable on outstanding rates.

The owner may on completion accept your undertaking pay the remaining instalments but cannot be forced to accept that undertaking. In other words, a seller can require you on settlement to pay the whole of your proportion for the year. We obtain a "Section 603 Certificate" which shows the rates owing on the property.

23. WATER SERVICE CHARGES

As with Council rates, the usual provision in the contract is that water service charges should be adjusted as at the date of completion. Water Authority charges start from 1 July each year and bills are issued quarterly. Outside the Sydney Water and Hunter Water areas, Local Councils are responsible for water rates, which are included in the Council rates assessment. There are rebates and partial rebates available for pensioners liable to pay water service charge. Details of these are best obtained direct from the appropriate Water Authority.

For a property supplied with water by a Water Authority, we obtain a "Section 41 Certificate" about service charges. The certificate shows the service charges, the environmental levy and the water usage charges for the current quarter. It also shows if the account has been paid. The Water Authority does not provide a meter reading service on request, and a water usage bill is issued only after the end of

of the quarter to which it relates. Usually water usage is adjusted on settlement based on the average water used over the previous period.

24. OTHER ENQUIRIES

We usually make a number of other enquiries - these include where appropriate:

- (a) Roads and Traffic Authority: It reveals whether the Roads and Traffic Authority has any plan to resume the land or part of it;
- (b) Land Tax: A person's privately owned principal residence is exempt (where the land value is less than \$1 million) and so are lands used for primary production, provided they are not owned by a company or trust. If the certificate reveals any Land Tax owing, we ensure it is paid before settlement or at least arrangements made to pay it after settlement. Land tax is a charge on the land just as Council rates and water charges are;
- (c) Drainage Diagram: The diagram shows where the sewer and the building connections are laid. The point of getting this certificate is to know where the sewer main runs in case you intend to build an extension over it. The main must be encased in concrete in that case and the building so designed that the Water Authority can get access to the line;
- (d) in appropriate cases we will make other enquiries about matters affecting the property from public authorities including:

Department of School Education	Local Electricity Authority	National Parks and Wildlife
Department of Fair Trading	Energy Authority of NSW	Pipeline Authority
Department of Housing	Forestry Commission	Rural Lands Protection Board
Department of Mineral Resources	Heritage Council of NSW	Soil Conservation Service
Department of Transport (Aviation)	Lands Department	State Rail Authority
Department of Water Resources	Maritime Services Board	State Pollution Control Commission
Environment Protection Authority	Mine Subsidence Board	

Our local knowledge is often useful in deciding what enquiries are appropriate.

25. BUILDING CERTIFICATES



The buyer under a binding contract may apply to the local Council for a Building Certificate. Prescribed fees are payable.

The Building Certificate can issue for any building or part of a building whenever it was erected or altered. If a Council refuses or fails to issue a Building Certificate within 40 days after the application is lodged, the applicant may appeal to the Land Environment Court. The local Council is required to keep a register of Building Certificates issued by it any person may inspect this register at the Council Chambers and, with the owner's consent, purchase a copy of it.

Most sellers who have a Building Certificate attach a copy of the certificate to the contract together with a copy of the Identification Survey Report on which the certificate is based. A Council may require a survey to be lodged with the application for a Building Certificate but it cannot require a new survey if the applicant has proved evidence that no material change has occurred in relation to the building since the date of the survey report.

26. REQUISITIONS

These are questions we submit to the seller's solicitor. Some ask the seller to do what the seller is already obliged to do under the contract. Others, however, ask important questions such as whether there are any disputes with neighbours over fences. Occasionally, the answers reveal something you could not have discovered by inspection the property and is of value to you to know. They are usually sent to the seller's solicitor after exchange of contracts. A seller who does not answer requisitions honestly may be liable for any consequential loss you suffer.

27. OCCUPATION BEFORE SETTLEMENT

Sometimes it suits both the seller and you for you to take possession of the property before settlement. A clause in the printed form of contract provides what is to happen in this situation. It is like a very short lease. You are to insure the property and not make any structural changes to it.

Normally the seller requires an occupation fee based on a market rental for the property and that occupation fee is paid on settlement in addition to the balance of the purchase money. Occasionally it is paid weekly to the agent. The clause provides for rates to be adjusted from the date of possession unless the parties agree otherwise. Normally the arrangement about occupation is confirmed in letters between the solicitors or included in the contract.

28. THE TIME OF SETTLEMENT

The contract usually provides for an agreed settlement date. Sometimes, however, no settlement date is provided. It may be impossible at the time of exchange of contracts to be certain when settlement can take place because of uncertainties about when the loan money

will be available, how long it will take to have a survey done, the searches and enquiries made, and so on.

If the seller or you do not settle on the due date, there is a method that a party can use to require the other to complete the sale. The method is to give the sale if there is an unreasonable delay. The method is to give the other party a "Notice to Complete". This notice has the effect making time "of the essence". The Notice must allow a reasonable time for settlement. Usually that is two weeks from the date of the notice. Such notices are rarely necessary. When one is served great care needs to be taken so the differences between the parties don't become so contentious they end up on Court.

Many contracts provide settlement must take place within six weeks. Failure of either party to settle on the stipulated date or within a stipulated time can give rise to a claim for damages for the loss suffered by the non-defaulting party. If a contract provides a date for settlement or a time within which settlement must take place and then states that the date or time stipulated is "of the essence" and for some reason settlement doesn't take place exactly on that date or within that time and the parties do not agree to disregard the breach of the clause, then the party not in default has a choice of remedies including claiming damages or rescinding the contract and claiming forfeiture of the deposit.

29. PROCEDURE FOR SETTLEMENT

When a date for settlement is known, the balance payable by you on settlement should be calculated. The usual practice is for us to make the calculations and submit them to the seller's solicitor for approval. Settlement normally takes place where the seller's title deeds are located.

On settlement the balance of the purchase money (plus or minus adjustments for rates etc) is paid in exchange for the Title Deeds and transfer documents. The money is paid in such a way as to enable the seller's mortgage debts to be repaid on settlement so that mortgage discharges can be handed over. Of course the seller pays the costs of registering the discharges of any mortgages. Usually the money is paid by bank cheque - that is, a cheque drawn on the bank's own funds, as distinct from a private account.



If a bank is lending, it usually pays the whole of the balance of the purchase money on settlement including the loan money. In other cases we will have obtained the balance of purchase money from you a day or so before settlement.

30. PROCEDURE AFTER SETTLEMENT



We usually contact you to advise settlement has taken place. Usually you will have to call and collect the keys to the property from the Agent. We then write to you setting out full details of the money paid over on settlement, and how it was calculated, if this information has not already been provided. We must prepare a Notice of Sale that must be lodged with the Transfer to enable the Transfer to be registered. The Office of Land and Property Information uses that form to notify the Local Council, the Water Authority, the Valuer General and Rural Lands Protection Boards of the fact of the transfer and details of your address for service of notices.

We (or your lender) also attend to registration of the transfer of title and any other relevant documents. If you have borrowed money to complete, the lender keeps the title deeds until the mortgage is discharged.

31. TELEPHONE, ELECTRICITY, GAS AND OTHER SERVICES

It is our function to ensure that you get a good title to the property in accordance with the deal made. It is up to you and not us to attend to all the other matters incidental to buying a property including transfer of the telephone service, connection of electricity and gas, redirecting mail from the Post Office, and so on.

32. THE KEEPING OF THE TITLE DEEDS

If there is no mortgage some buyers put the title deeds in a safe custody packet at our office. There is no charge for this service.



DISCLAIMER

This Guide has been prepared to help you to understand the legal aspects of buying a commercial property. It is not intended to be a kit setting out the procedures for buying or selling a commercial property and therefore does not seek to deal comprehensively with each step along the way nor with all the problems and difficulties, which need to be examined in the course of buying.

You should not rely on the contents of this publication without first obtaining our advice.